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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER BERNARD NELSON, Defendant and Appellant.	C085389 (Super. Ct. No. 16FE013712)

Following a jury trial, defendant Christopher Bernard Nelson was convicted of second degree murder with an enhancement for personal use of a firearm. He was sentenced to 40 years to life in state prison. On appeal, defendant contends the trial court prejudicially erred in failing to inform the jury that the initial aggressor in a confrontation may be entitled to self-defense, and the matter should be remanded to allow the trial court to exercise its discretion whether to strike the firearm enhancement. We shall remand for the exercise of discretion on the enhancement and otherwise affirm.

BACKGROUND

In 2016, Roy F. lived in Sacramento with his teenage son T. C. Roy F. sold marijuana and produced Caribbean or reggae music. Roy F. worked with several friends, including Gregory Allison (aka "Twice"), "Dutch," "Emms," and "BadAzz."

Defendant was a marijuana dealer who lived in Virginia Beach, Virginia. In early July 2016, he flew to Sacramento to buy $6,000 worth of marijuana from Roy F. He stayed in Sacramento for a few days, both on his own in a hotel room, and then with Roy F. at his apartment, before finally flying back to Virginia. Defendant and Roy F. seemed friendly at the time.

A few days after the transaction, Roy F. told defendant the marijuana was lost in transit from Sacramento to Virginia. Defendant believed Roy F. was lying and had cheated him out of the marijuana. Desperate to return to California, defendant asked his girlfriend and mother of his child, Shaquilia Turner, to drive him from Virginia to California. She declined at first because no one was available to take care of her three children, but relented after defendant threatened to kill her and then himself if she did not take him. Defendant contacted Roy F. via phone during the drive to Sacramento. Defendant and Turner stayed at a Motel 6 when they arrived in Sacramento.

They checked out of the motel and Turner drove defendant to Roy F.'s apartment complex on the following day. He entered the apartment complex and returned a few minutes later, telling Turner that Roy F. was in the apartment. He told Turner that he and Roy F. were going to meet some guys; defendant had Turner follow Roy F., but then instructed her to return to the Days Inn where he was going to meet Roy F. Over the next several hours, defendant sent texts to Turner instructing her to keep the car hidden and to park at different locations.

Roy F., his son, and his associates were packing and moving to a Days Inn that morning. Defendant showed up while they were packing. Defendant was accompanied by Roy F., Cooper, and "BadAzz" in Roy F.'s car as they drove to the motel. Throughout the day, Roy F. and his associates took defendant to several homes in an unsuccessful attempt to find defendant some marijuana. Later that day, one of them rented a room for defendant at the Days Inn.

Later, after sunset, defendant told Turner to move her car behind a dumpster at the rear of the Days Inn and to turn the headlights off. Defendant expected two men to come to the motel with marijuana. That night, defendant returned to Turner's car to get his gun, which he had stashed in Turner's purse. Defendant had an evil look on his face when he retrieved the firearm.

Around 11:00 p.m., Roy F. and his associates returned to their room with food. T. C. and Allison decided to leave and get more food. As T. C. was waiting for Allison in the hallway, defendant came up behind him. Defendant followed T. C. into the motel room, closing the door behind him.

Defendant asked to borrow a phone charger, but no one answered. He held a pistol in his right hand, close to the hip. Pointing the gun at them, defendant told the men not to move or do anything. When they tried to get defendant to calm down, he told them to "shut the fuck up." Roy F. was either on or moved closer to one of the beds, while T. C. ducked down behind the other bed.

Defendant fired what T. C. and Allison thought was a warning shot. "BadAzz" jumped out of the second story window, followed by Allison, "Dutch," and "Emms". Allison, the last to leave, heard two or three more shots as he fled the room.

T. C., who was hiding and could not see anything, heard several more shots followed by the door opening and closing. A surveillance video showed defendant running out of the room while stuffing a handgun down the front of his pants.

T. C. emerged from under the bed to find his father in a corner on his stomach, not moving. He yelled out the window for someone to call 911. Responding police officers determined Roy F. was dead, having sustained a gunshot wound to the leg and a fatal gunshot wound to the chest. Four expended nine-millimeter shell casings were found at the scene. Bullet holes were found in both beds of the motel bedroom, with slugs inside both beds, in the box springs.

Following the shooting, Turner drove from the Days Inn to find a place to park. Defendant called her from a number she did not recognize. She retrieved defendant, and they returned to the parking lot where Turner had slept with her children. Defendant drove to an outdoor shopping mall the next morning, where he received money wired from a family member in Virginia.

When Turner told defendant it looked like a body had been thrown out of the window at the Days Inn, defendant replied that she had seen a bag, not a body. He told her a guy threw the bag out of the window and came out after it; defendant guessed it was to protect the marijuana. When Turner asked if anyone was hurt, defendant said he thought Roy F. was hurt, but he was unsure. He asked Turner to delete the texts he had sent to their phone when they were in Sacramento.

Defendant and Turner began to drive back to Virginia, but defendant was arrested by Utah state troopers the day after the murder. Defendant gave a statement to a Sacramento police detective. Asked what happened, he said, "They took my money and I just wanted it back." Defendant told the detective he thought Roy F. and his friends had tricked him out of the $6,000. He had given Roy F. the money and returned to Virginia; when the marijuana did not arrive, Roy F. claimed it was lost and the problem must have been on defendant's end.

Defendant said Roy F. told him to bring some more money back and he would get defendant marijuana. He did not bring a lot of money with him, as he planned to take the marijuana. When he entered the motel room, defendant just wanted his money returned.

Defendant explained that upon entering the motel room he said, "Then I tell them, 'I just want my money.' And that they were starting to move towards me. So I'm like, 'Just stay and I w-- just want my money,' and one of them was right by the window. I'm like, 'You don't jump. You don't have to jump, man.' I just want my stuff, because he had -- he had -- looked like he had it in the bag or -- or yeah. [¶] . . . [¶] So -- and -- and then I said, 'You don't have to jump.' So then they all start like attack me."

Defendant told the detective a man came up and scratched his hand with a sharp object like a key. Other men in the room rushed toward defendant. Defendant accidentally fired his pistol during the struggle with the man who scratched his hand, and he accidentally fired several more times when the others joined the struggle. Then the men got past defendant and ran out of the room.

Defendant testified that he gave Roy F. and his associates $6,000 to pay for marijuana they would mail to him in Virginia. He was to receive three pounds of marijuana, which would arrive in two days. When the marijuana did not arrive as expected, he called Roy F., who said something must have happened on defendant's end. They agreed that if defendant returned to Sacramento, Roy F. would get him some marijuana to even it out. Defendant decided to drive rather than fly to Sacramento so he could return home with the drugs himself rather than relying on the mail.

After arriving in Sacramento, defendant spent time with Roy F. and his associates unsuccessfully trying to find some marijuana. Roy F. rented a room for defendant at the Days Inn where Roy F. and his associates were staying. Defendant fell asleep soon after he entered the room. When defendant awoke, he went to the parking lot where he retrieved his gun from Turner. Around 11:00 p.m., defendant saw Roy F. and an associate return to Roy F.'s hotel room. Defendant then decided to meet Roy F.

When defendant rejected Roy F.'s suggestion that he go get some food with T. C., Roy F.'s associates started moving on him and insisted he comply with the suggestion. Defendant drew his gun; he was afraid because one man had his hand in his waistband

like he might have a gun and defendant thought the others might be holding weapons as well. He showed the men his pistol and told them to stop and back up, but they kept moving toward him.

The man holding his hand in his waistband pulled out an item and stabbed defendant in the arm with it. The man also grabbed defendant by his arm as the other men advanced on him. One of the men got his hand around defendant's gun hand and pinned it against the wall, causing the gun to discharge. Two or three more shots were fired before defendant freed himself and ran through the door.

Defendant never demanded money or marijuana from the men. Once free, he contacted Turner and they headed back to Virginia. He did not know someone was killed until police told him, which caused defendant to break down and cry.

DISCUSSION

I

Instruction On Aggressor's Right To Self-Defense

Defendant contends the trial court erred when its response to a jury question about self-defense did not instruct the jury on the aggressor's right to self-defense. We disagree.

The trial court instructed the jury on self-defense, CALCRIM No. 505, and imperfect self-defense, CALCRIM No. 571.

The imperfect self-defense instruction stated in pertinent part:

"A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense.

"If you conclude the defendant acted in complete self-defense, his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense and imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was reasonable.

"The defendant acted in imperfect self-defense if:

"1. The defendant actually believed that he was in imminent danger of being killed or suffering great bodily injury;

"AND

"2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger;

"BUT

"3. At least one of those beliefs was unreasonable.

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be.

"In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant.

"A danger is imminent if, when the fatal wound occurred, the danger actually existed or the defendant believed it existed. The danger must seem immediate and present, so that it must be instantly dealt with. It may not be merely prospective or in the near future.

"Imperfect self-defense does not apply when the defendant, through his own wrongful conduct, has created circumstances that justify his adversary's use of force."

In closing, the prosecutor argued that even if the jury believed defendant's testimony, he was still guilty of murder because he was the aggressor. Later, the prosecutor argued: "You don't get to claim self-defense if you're the one [who] gives rise to the need for self-defense. [¶] He pulls out the gun first. He doesn't then get to claim I only fired it because I thought they were going to attack me. Because, guess what? In that situation they get to attack him. They get to use force against him to disarm him to save themselves especially when they're pinned in a hotel room with no other means of escape but jumping out of a second floor window." Defendant did not object to either argument.

During deliberations, the jury asked the trial court, "If the defendant is the aggressor first does the defendant have a self[-]defense defense?" The trial court indicated it was inclined to simply refer the jury back to CALCRIM No. 571. Defendant argued for the jury to be given CALCRIM No. 3471 on mutual combat or initial aggressor, an instruction that had not been given to the jury.[1] The trial court rejected defendant's proposal and, over defendant's objection, answered the jury: "The question you raise is explicitly answered in instruction 571 on the issue of imperfect self[-]defense and/or Instruction 505 on the issue of self[-]defense."

Defendant asserts the jury's question may have been prompted by the prosecutor's argument that self-defense was not available to defendant as the aggressor, an argument he asserts misstates the law. He notes that while imperfect self-defense and perfect self-defense do not apply when the victim is legally justified in resorting to self-defense against defendant, "both defenses do apply when the victim's use of force against the defendant is unlawful, despite the fact that the defendant set in motion the chain of events that led the victim to attack him." Defendant claims the evidence would support a finding that he was trying to retreat as the group attacked him, but the suddenness of their approach rendered this impossible. From this, he reasons that, "even if he had disqualified himself from claiming self-defense or imperfect self-defense when he drew his pistol, he regained his right to self-defense and imperfect self-defense when that occurred." Defendant concludes that the trial court's failure to instruct the jury on these

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[1] CALCRIM No. 3471 states in pertinent part: "[However, if the defendant used only non-deadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend (himself/herself) with deadly force and was not required to try to stop fighting(,/or) communicate the desire to stop to the opponent[, or give the opponent a chance to stop fighting].]"

points of law was error of constitutional magnitude, depriving him of his rights to due process, proof beyond a reasonable doubt, and jury trial.

Penal Code[2] section 1138 requires a judge to answer questions posed by the jury during their deliberations in open court. "Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky. [Citation.] The trial court [may be] understandably reluctant to strike out on its own. But a court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least *consider* how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) The trial court's decision to instruct or not to instruct is reviewed under the abuse of discretion standard. (*People v. Waidla* (2000) 22 Cal.4th 690, 745-746.) A claim that the substantive information conveyed was inaccurate is a question of law, which we review de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.)

Generally, "the self-defense doctrine 'may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical attack or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified.' " (*People v. Eulian* (2016) 247 Cal.App.4th 1324, 1333.) Defendant's claim is based on the principle that a person who initiates a conflict may resort to lethal force when the victim responds with lethal force and there is no avenue for retreat. " 'Where the original aggressor is not guilty of a deadly attack, but of a simple assault or trespass, the victim has no right to use deadly or other excessive force. . . . If

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[2] Undesignated statutory references are to the Penal Code.

the victim uses such force, the aggressor's right of self-defense arises. . . .' " (*People v. Quach* (2004) 116 Cal.App.4th 294, 301.) The cases he primarily relies upon all stand for this principle. (See *ibid.*; *People v. Flannelly* (1900) 128 Cal. 83, 91 [" 'Where one is the first wrongdoer, but his unlawful act is not felonious, as a simple assault, upon the person of another, or a mere trespass upon his property, even though forcible, and this unlawful act is met by a counter-assault of a deadly character, the right of self-defense to the first wrongdoer is not lost' "]; *People v. Ramirez* (2015) 233 Cal.App.4th 940, 943 ["[a] person who contrives to start a fistfight or provoke a nondeadly quarrel does not thereby 'forfeit[] . . . this right to live' "].) For this reason the modification given to CALCRIM No. 3472 suggested by defendant is available only, if at all, "in the rare case in which a defendant intended to provoke only a nondeadly confrontation and the victim responds with deadly force." (*Eulian*, *supra*, at p. 1334.)

Defendant's statements, both in his testimony and his statement to the police, show the other people in the room did not advance on him until after he drew his pistol. He did not initiate nonlethal combat or commit some other lesser aggression. Defendant drew a deadly weapon on the other men in the room who, in the version of the evidence most favorable to the defense, did not respond with deadly force, but rather rushed him, pinned his gun hand to the wall, and then left the room after the weapon discharged several times. The modification to CALCRIM No. 3472 defendant suggests is inapplicable because this is not the rare case where the aggressor initiates nonlethal force and the victim escalates to lethal force. The instructions given in reply to the jury's question correctly state the law and the response suggested by defendant at trial and on appeal would only misapply the law and potentially confuse the jury. The court's answer was correct and therefore was not an abuse of discretion.

II

Firearm Enhancement

The jury sustained a section 12022.53 enhancement for personally discharging a firearm resulting in death to a nonaccomplice. Defendant contends the matter should be remanded to allow the trial court to determine whether to exercise its discretion to strike the enhancement pursuant to Senate Bill No. 620. We agree.

On October 11, 2017, the Governor signed Senate Bill No. 620 (Stats. 2017, ch. 682, § 2). This bill amended sections 12022.5 and 12022.53, effective January 1, 2018, to allow the trial court discretion to dismiss a firearm enhancement imposed pursuant to this section. (§§ 12022.5, subd. (c), 12022.53, subd. (h).) The amendment to sections 12022.5 and 12022.53 applies retroactively to cases not final on appeal. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.)

The People agree that the amendment to section 12022.53 applies retroactively, but assert remand is unnecessary because the trial court's statements at sentencing noting four aggravating factors with only one in mitigation, and that the record showed ample evidence of premeditation and planning, support finding a remand unnecessary. We disagree.

"Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) Unlike the court in *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896, here, we cannot say "the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations." Accordingly, we shall remand for the trial court to determine whether to exercise its discretion to strike the enhancement.

DISPOSITION

The matter is remanded to the trial court to consider whether to exercise its discretion to strike defendant's firearm enhancement. The judgment is otherwise affirmed.

/s/
Robie, Acting P. J.

We concur:

/s/
Murray, J.

/s/
Renner, J.